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No. 648

In the Supreme Court of the United States

October Term, 1961

J. E. Braig, Appellant

v.

Elvis J. Stahr, Jr., Secretary of the Army; Hamilton Allen, Under Secretary of the Army; and Major General Joe C. Lambert, the Adjutant General of the Army

On Appeal from the United States Court of Appeals for the District of Columbia

Motion to Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 648

J. B. BEARD, APPELLANT

v.

ELVIS J. STAHR, JR., SECRETARY OF THE ARMY; STEPHEN AILES, UNDER SECRETARY OF THE ARMY; AND MAJOR GENERAL JOE C. LAMBERT, THE ADJUTANT GENERAL OF THE ARMY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, appellees move that the judgment of the United States District Court for the District of Columbia (J.S. App. A19) be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. A1–A18) is not yet reported.

JURISDICTION

This action was brought by appellant, a commissioned officer in the Regular Army, to enjoin appel-

lees from determining whether to remove appellant from the Army on the ground that the separation procedures established by 10 U.S.C. Supp. II, 3791, *et seq.*, violate the Due Process Clause of the Fifth Amendment. A three-judge district court was convened and on December 19, 1961, entered its final decree, granting appellees' motion for summary judgment, denying appellant's motion for preliminary injunction, and dismissing the complaint (J.S. App. A19). Notice of appeal was filed in the district court on December 20, 1961 (J.S. 2). The jurisdictional statement was filed on January 5, 1962. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the procedures of 10 U.S.C. Supp. II, 3791–3797, authorizing the separation for cause of an officer from the active list of Regular Army officers, violate, on their face or as applied to appellant, the Due Process Clause of the Fifth Amendment.

STATUTES INVOLVED

Sections 3791–3797 of Title 10 of the United States Code, Supp. II, as amended, are set forth in the Appendix, *infra*, pp. 20–23.

STATEMENT

In the early evening of September 21, 1960, appellant, a commissioned officer in the Regular Army on an official visit to Washington, entered the YMCA in Washington and went downstairs to the men's room (J.S. App. A3).[1] When he returned to the lobby, a

[1] Our statement of the facts is mainly taken from the opinion below (J.S. App. A3–A8). Appellant does not challenge the district court's recital of the facts (see J.S. 4 *ff.*).

city detective (in plain clothes) assigned to the YMCA as part of a program to prevent homosexuals from frequenting the building (J.S. App. A4) nodded at the appellant and went downstairs to the men's room (J.S. App. A3). Appellant followed him there and, after a brief exchange, the detective arrested appellant and took him to police headquarters (J.S. App. A3–A4). Appellant was not charged at police headquarters, but, after questioning, was released and turned over to the military authorities (J.S. App. A4).

Subsequently, administrative proceedings, pursuant to 10 U.S.C. Supp. II, 3791–3797 (App., *infra*, pp. 20–23), were commenced to determine whether appellant should be separated from the service for moral or professional dereliction (J.S. App. A5). A Selection Board, convened under 10 U.S.C. Supp. II, 3791, determined that appellant should be required to show cause for his retention on the active list of the Regular Army, alleging (a) the existence of homosexual tendencies and (b) conduct unbecoming an officer (J.S. App. A5). A Board of Inquiry was then convened at Norfolk, Virginia (where appellant was stationed) for the purpose of according appellant a "fair and impartial hearing" on the "show cause" order, pursuant to 10 U.S.C. Supp. II, 3792. A hearing was "patiently and thoroughly" (opinion below, J.S. App. A5) conducted by the Board of Inquiry, at which appellant, who was represented by military counsel, presented evidence not only concerning the specific facts in-

volved in the September 21st incident, but also regarding his military record and his reputation and character (J.S. App. A5).

The evidence presented by the Army was documentary, including a formal written statement prepared by the detective at the time of the incident (J.S. App. A5). The police officer's statement averred that after some innocuous conversation with appellant he had indicated to appellant that he was looking for a partner for a homosexual act, that appellant made a reply that seemed to acquiesce and then touched the detective's body in an indecent manner (J.S. App. A3). The police officer then identified himself, exhibited his badge, and placed appellant under arrest (J.S. App. A3–A4). The Board of Inquiry requested the detective to appear and testify in person, but he declined when the Metropolitan Police Department of the District of Columbia refused to pay his expenses to Norfolk (J.S. App. A6). The documentary evidence also revealed that appellant, when stationed in the Pacific during the war, had been a passive victim of a momentary, unconsummated homosexual attempt on the part of another officer. This information was elicited from appellant during exhaustive interviews with him after the September 21st incident (J.S. App. A6).

Appellant admitted that his conduct on September 21st had been very foolish, but denied that he intended to engage in any homosexual practice (J.S. App. A6). Instead, he contended that he had participated in the episode because, believing that the detective was a homosexual, he wanted to learn how

such persons operate (J.S. App. A6). An Army psychiatrist, called as a witness by the appellant, stated that in his opinion appellant was not a homosexual. He suggested, however, that the appellant receive psychiatric out-patient treatment, preferably in a civilian facility (J.S. App. A6). Appellant testified at length on his own behalf and witnesses were called and documentary evidence submitted showing the high quality of appellant's military record and attesting to his good character and reputation (J.S. App. A6).

The Board of Inquiry found that appellant had failed to show cause for his retention, and recommended that he be eliminated from the service and be granted a General Discharge under Honorable Conditions. In particular, the Board found (J.S. App. A7):

> 1. As to the allegation of existence of homosexual tendencies, that cause for retention has not been shown. This finding is based on the following reason:
>
> The evidence presented by the respondent has not refuted nor rebutted the homosexual tendencies exhibited by the actions which took place in the YMCA, Washington, D.C., on the night of 21 September 1960.
>
> 2. As to the allegation of conduct unbecoming an officer, that cause for retention has not been shown. This finding is based on the following reason:
>
> The actions of the respondent in permitting himself to be lured by a complete stranger into a latrine, and in that latrine

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> acting in such a manner as to cause his arrest, are completely incompatible with the conduct expected of an officer.

A Board of Review, convened pursuant to 10 U.S.C. Supp. II, 3793, App., *infra*, p. 21, reviewed the record of the hearing before the Board of Inquiry, and, on October 24, 1961, recommended that the Secretary of the Army remove appellant from the active list and award him a General Discharge (J.S. App. A7–A8).

On October 25, 1961, the day after the Board of Review made its recommendation, appellant brought this suit in the United States District Court for the District of Columbia to enjoin the Secretary, the Under Secretary, and the Adjutant General of the Army from determining whether appellant should be removed from the Army and, if he should be removed, from determining the type of discharge he had earned. Appellant alleged that the administrative proceedings authorized by 10 U.S.C. Supp. II, 3791–3797 are unconstitutional (on their face and as applied to him) because they deprive him of his office and retirement benefits without procedural due process in that he had to show cause that he was qualified to hold his office, and, since the Board of Inquiry lacked subpoena power, he could not confront and cross-examine the detective involved in the incident at the YMCA.

The district court temporarily restrained the appellees "from taking any steps looking to the removal of the [appellant]" from the Army (J.S. 9–10). A three-judge district court was thereafter convened. It sustained the constitutionality of the separation statute, noting that it has been the continuous and accepted understanding and practice from the adoption of the

Constitution that a military officer is subject to removal at the discretion of the President, or pursuant to procedures promulgated by Congress. As to appellant's objections to the administrative procedures, the court held that there is no constitutional objection to the statutory procedure which places the burden on the officer of convincing his superiors that he should not be eliminated from the service. The court said (J.S. App. A16):

> Bearing in mind that the purpose of the statute is not to provide for trial of officers on specific charges, but to create an administrative machinery and routine for eliminating officers who do not meet the required standards, there is no constitutional objection to placing the burden of proof where it is deemed appropriate to do so in the interests of the public welfare. The essence of the statute is that if a doubt arises whether a particular officer should be retained in the service, he has the onus of convincing his superiors that he should not be eliminated. * * *

With respect to appellant's asserted right to confrontation and the absence of statutory provision therefor, the court said (J.S. App. A16):

> The second objection is that there is no provision for confronting the officer with witnesses against him. The constitutional provision for confrontation is a vital feature of the Bill of Rights. It is intended, however, for trials in the criminal courts and is a safeguard in the administration of the criminal law. It does not necessarily have an essential function in other activities of Government. * * *

ARGUMENT

The Congressional enactment (10 U.S.C. Supp. II, 3791–3797, App., *infra*, pp. 20–23) under attack in this case is a military separation statute adopted to improve the quality and efficiency of the Regular Army officer corps by providing an administrative procedure for removing officers who have failed to meet the high moral and professional standards required of officers.[2] The statute establishes, primarily, an administrative process for eliminating the officer whose conduct, while perhaps not sufficient to justify a court-martial for a specific offense, provides good reason to doubt that he is professionally or morally suitable.[3]

Appellant argues that these statutory removal procedures are unconstitutional, both on their face and as applied,[4] because they purportedly deprive him of his office without the procedural safeguards said to be guaranteed him by the Due Process Clause of the Fifth Amendment. Implicit in appellant's arguments is the premise that one in his position is entitled to

[2] 1960 U.S. Code Cong. & Admin. News 2869–2870. Prior to 1960, 10 U.S.C. 3781–3786 provided a procedure for removing both the substandard and the unsuitable officer. In 1960, however, Congress amended 10 U.S.C. 3781–3786 and made it applicable only to separations for substandard performance of duty, adding a new Chapter 360. The legislation also gave the Army temporary authority to remove permanent colonels and lieutenant colonels who had three or more times failed of promotion to the next highest grade. 74 Stat. 386, 395.

[3] Hearings Before Subcommittee No. 1, House Committee on Armed Services, on S. 1795, 86th Cong., 1st Sess., 3815–3816, 3682, 3834–3835.

[4] Appellant does not now raise any statutory or other nonconstitutional issue (see J.S. pp. 2–3, 12–14, incl. fn. 4, pp. 16–18, incl. fn. 7, pp. 19–20).

a trial-type proceeding and the corollary that any procedure which does not measure up to this standard is invalid. This claim to a trial-type hearing, as a precedent to separation, is wholly without constitutional basis. The statutory procedures, on their face and as applied, are fundamentally fair and reasonable and in no way violate the Fifth Amendment. No substantial question is involved and the judgment below should be summarily affirmed.

1. This Court has often recognized that an Army officer can be removed summarily (*McElrath* v. *United States*, 102 U.S. 426; *Blake* v. *United States*, 103 U.S. 227; *Crenshaw* v. *United States*, 134 U.S. 99; *Wallace* v. *United States*, 257 U.S. 541; see also, Winthrop, *Military Law*, 1056–1057, 1066 (1886)) or pursuant to a procedure established by Congress but which does not provide for a trial-type hearing. *Reaves* v. *Ainsworth*, 219 U.S. 296; *French* v. *Weeks*, 259 U.S. 326; *Creary* v. *Weeks*, 259 U.S. 336; see also, *Payson* v. *Franke*, 282 F. 2d 851 (C.A.D.C.), certiorari denied, *sub nom. Robinson* v. *Franke*, 365 U.S. 815. This power of removal stems, of course, from the nature of the authority to command, govern, and regulate the Army vested in the President and Congress by the Constitution.[5] Though the Executive power of removal is plenary, it is the province of Congress to establish procedures to be followed in effecting removal designed to assure the officer a standard

[5] Art. II, Sec. 2: "The President shall be Commander in Chief of the Army and Navy of the United States * * *."

Art. I, Sec. 8, Cl. 14: "Congress shall have power 'To make Rules for the Government and Regulation of the land and naval Forces.'"

of fairness commensurate with the needs and exigencies of the military operation.

It has never been held or thought that the Due Process Clause of the Fifth Amendment prevents removal for cause unless preceded by a trial-type hearing. To the contrary, long-standing decisions of this Court make it plain that military officers hold a position of "privilege," of "trust and confidence" (*Orloff* v. *Willoughby*, 345 U.S. 83, 90-91);[6] that the military itself is the best judge as to which officers are fit to serve; and, accordingly, that military separation proceedings need not embody "the safeguards of a trial in court." *Reaves* v. *Ainsworth*, 219 U.S. 296, 306; see *French* v. *Weeks*, 259 U.S. 326, 327–328; *Creary* v. *Weeks*, 259 U.S. 336; *Rogers* v. *United States*, 270 U.S. 154; *Payson* v. *Franke*, 282 F. 2d 851, 853 (C.A.D.C.), certiorari denied, *sub nom. Robinson* v. *Franke*, 365 U.S. 815; see, also, *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94. In *Reaves* v. *Ainsworth*, 219 U.S. 296, answering a due process argument similar to that ad-

[6] The Army Regulations (AR 635–105, App. I, Sec. I, para. 2) declare: "No person has an inherent right to continue service as an officer. The privilege of service is his only so long as he performs in a satisfactory manner. Responsibility for leadership and example requires that an officer accomplish his duty effectively and conduct himself in an exemplary manner at all times. The Army has no place for officers who cannot meet these requirements and their elimination is essential. In view of the rapidity with which hostilities can now occur and the attendant likelihood that many officers may be called to active duty on short notice, the same standards of efficiency and conduct apply to officers of all components of the Army of the United States."

vanced by appellant, the Court said (219 U.S. at 304):

> * * * Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts. *Johnson* v. *Sayre*, 158 U.S. 109. See also, *Mullan* v. *United States*, 212 U.S. 516.

Similarly, *Creary* v. *Weeks*, 259 U.S. 336, involved Section 24b of the National Defense Act of 1920 (41 Stat. 773), a statutory scheme which was, in essential respects, identical to that in issue here.[7] Section 24b provided for the classification in "Class B" of Army officers who, in the opinion of a selection board, should be retired from the service. An officer so classified could appear before a court of inquiry, where he would "be furnished with a full copy of the official records upon which the proposed classification [was]

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[7] "It is argued that his commission in the army constituted property of which to be retired from the army, with pay for life, was a valuable attribute, and of which he could not be deprived without due process of law. Such process, he urges, 'consists of two independent parts, both of which must be lawful: one, the proceeding before the board of examination and its report, which conforms in all respects to a "decision" by a judge, which is the foundation of a judgment: second, the confirmation of that report by the President.'"

As to this argument, the Court said: "* * * the contention and argument are without foundation * * *." 219 U.S. at 304.

[8] The statute here involved was patterned after this Army B Board proceeding. Hearings Before Subcommittee No. 1, House Committee on Armed Services, on S. 1795, 86th Cong., 1st Sess., 3837, 3721.

based * * * and be given an opportunity to present testimony in [his] own behalf." 41 Stat. 773. Two other boards were then to consider the matter, the third board to determine on the basis of the records before the court of inquiry whether the officer had been placed in Class B because of his neglect, misconduct, or avoidable habits. If he had, he was to be discharged without pay or retirement benefits. Creary, who had been discharged pursuant to this procedure, claimed that, since he had not been accorded a hearing before either the second or the final board, he had been deprived of his rights under the Due Process Clause of the Fifth Amendment. The Court unanimously rejected Creary's contention, concluding that, since the boards had acted pursuant to the terms of the statute, the discharge had been valid. The Court said (259 U.S. at 343.):

> The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country (Art. I, § 8) is as plenary and specific as that given for the organization and conduct of civil affairs; * * *. It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduction in number of the officers of the Army, * * *. In its nature it belongs to the executive and not to the judicial branch of the Government.

It is clear, we submit, that one in appellant's position is not as a matter of constitutional right entitled

to the trial-type hearing claimed here. The decisions of this Court on this point leave no room for controversy. The underlying rationale of these holdings is that to engraft upon the military, in matters of separation, "the safeguards of a trial in court"[9] would be wholly out of keeping with the nature of the military operation and the privileged character of an officer's position. Not only is the military the best judge of the fitness of its officers, but an officer's ability and character materially affect the efficiency, discipline, and morale of the Army itself. These factors, of course, ultimately relate to the safety and security of the nation.

2. Decisions of this Court pertaining to civilian employees serve further to confirm the correctness of the decision below. This Court has repeatedly ruled that a civilian employee of the government may, so far as the Constitution is concerned, be dismissed for cause either summarily or without a trial-type hearing. See, *e.g.*, *Keim* v. *United States*, 177 U.S. 290; *Brown* v. *Lane*, 232 U.S. 598; *Eberlein* v. *United States*, 257 U.S. 82; *Vitarelli* v. *Seaton*, 359 U.S. 535, 539; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894–897. Indeed, the Lloyd-LaFollette Act, 5 U.S.C. 652(a), which prohibits the removal of a person from the classified civil service except for cause, itself provides that "[n]o examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal * * *."

Brown v. *Lane*, *supra*, involved a congressional enactment which authorized the Secretary of the In-

[9] *Reaves* v. *Ainsworth*, 219 U.S. 296, 306.

terior to remove the elected members of an Indian tribal council for cause. The Secretary removed the eight members of the council for various acts of misfeasance or nonfeasance without either notice or an opportunity to be heard. The Court rejected the argument that the removal without notice or hearing violated the Fifth Amendment as so "wholly unsubstantial" . . . "as to afford no ground whatever for the exercise of jurisdiction." 232 U.S. at 601. Similarly, in the recent case of *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, this Court held that the government could exclude, without either notice or hearing, an individual from a military installation and from employment with a base concessionaire for failure to meet security requirements determined by the base security officer. After noting that access to a military installation is a privilege subject to the plenary power to regulate the installation vested in the Executive, the Court held (367 U.S. at 894–895):

> The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * *
>
> * * * * *
>
> * * * Where it has been possible to characterize that private interest * * * as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 340–343; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Jay* v. *Boyd*, 351 U.S. 345, 354–358; cf. *Buttfield* v. *Stranahan*, 192 U.S. 470, 497.

Additionally, in *Shields* v. *Sharp*, C.A.D.C. No. 15,666, November 1, 1960 (removal for homosexual

act and homosexual associations), *Williams* v. *Zuckert*, C.A.D.C. No. 16,345, December 9, 1961, and *Dering* v. *Campbell*, 194 F. 2d 876 (C.A.D.C.) (removal for misconduct), the Court of Appeals for the District of Columbia Circuit has sustained the validity of removal procedures where the hearing board lacked subpoena power and, therefore, the "accused" was unable to confront and examine his "accusers". Certiorari was denied in *Shields* v. *Sharp*, 366 U.S. 917 (Oct. T., 1960, No. 773), and *Dering* v. *Campbell*, 344 U.S. 826. See, also, *Angilly* v. *United States*, 105 F. Supp. 257 (S.D.N.Y.), affirmed, 199 F. 2d 642 (C.A. 2).

The decisions in *Greene* v. *McElroy*, 360 U.S. 474; *Bland* v. *Connally*, 293 F. 2d 852 (C.A.D.C.), and *Davis* v. *Stahr*, 293 F. 2d 860 (C.A.D.C.), relied on by appellant, are readily distinguishable. In these cases the courts did not reach the question whether the denial of the opportunity to confront and cross examine witnesses was, under the circumstances, unconstitutional. The cases did not involve, moreover, impairment of an interest which was a privilege subject to the Executive's plenary power, such as employment by the federal government or the holding of an active military commission. *Greene* concerned the right of an individual to work for a private employer and to earn a livelihood; and the government's action impinged upon First Amendment rights of freedom of speech and association. Bland was an *inactive reservist* who received a less than honorable discharge because of his civilian associations and ac-

tivities. Finally, *Greene*, *Bland* and *Davis* involved allegations affecting loyalty, and, unlike the instant case, the "accused" neither knew his "accuser" nor the full nature and content of the charges against him.

3. (*a*) The hearing procedures provided by Chapter 360 are fair and reasonable for this type of proceeding and entirely consistent with due process. The purpose of the statute is not to try and punish the individual officer. It permits the officer to retire in his present grade, if qualified, or to be discharged with severance pay. Section 3796, Appendix, *infra*, pp. 22–23; see, also, Hearings Before Subcommittee No. 1, House Committee on Armed Services, on S. 1795, 86th Cong., 1st Sess., 3815. An officer under consideration for removal from the active list is entitled to be notified in writing of the charges against him (Section 3795 (1)), and is allowed a reasonable time to prepare his defense (Section 3795(2)) The officer also is permitted to appear in person and by counsel before the Board of Inquiry (Section 3795(3)) and is to receive a "fair and impartial" hearing (Section 3792(b)). While the Board of Inquiry does not have subpoena power, the officer is allowed copies of all relevant records (Section 3795(4)). The officer thus knows the nature of the evidence against him. And since the purpose of the statute is to improve the efficiency of the Army, it is not unreasonable to require the officer to demonstrate his fitness to the satisfaction of his superiors. Finally, the findings and recommendations of the Board of Inquiry are subject to review, on the basis of the entire record, by another board of general officers and, in turn, by the Secretary of the Army.

It should be emphasized that these separation procedures apply not only to moral dereliction or specific acts of misconduct but also to officers charged with substandard performance of duty (cf. *Payson* v. *Franke, supra*), unsuitability (cf. *Reed* v. *Franke*, C.A. 4, No. 8270, decided November 7, 1961; *Reaves* v. *Ainsworth, supra*), or failure to perform their duty (see Army Regulations 635–105, Sec. II, para. 11). In all such cases, the officers would suffer the same alleged injuries as appellant, *i.e.*, loss of position and retirement benefits, and the possibility that the proceeding may be the basis for a less than honorable discharge. Cf. *Ives* v. *Franke*, 271 F. 2d 469 (C.A. D.C.).[10] Appellant's argument would require a full trial-type hearing

[10] The fact that the findings of this separation proceeding may, in connection with appellant's entire record, form the basis for a less than honorable discharge does not require that appellant be given a trial-type hearing. The type of discharge that should be awarded to a soldier, particularly a discharge from active service, is a matter peculiarly within the administrative expertise of the military, and a determination of this question need not be accompanied by a trial-type hearing. Cf. *French* v. *Weeks*, 259 U.S. 326, 327–328; *Rogers* v. *United States*, 270 U.S. 154; *Orloff* v. *Willoughby*, 345 U.S. 83; *Payson* v. *Franke*, 282 F. 2d 851, 853 (C.A.D.C.), certiorari denied, *sub nom. Robinson* v. *Franke*, 365 U.S. 815. AR 635–200, Sec. II, para. 5, requires only that a bad conduct or dishonorable discharge be preceded by a trial, and less than honorable discharges have been given without a hearing at all. *Ives* v. *Franke*, *supra*; *Reed* v. *Franke*, C.A. 4, No. 8270, November 7, 1961.

Both the honorable discharge and the general discharge entitle the veteran to full rights and benefits, AR 635–200, Sec. III, para. 8, and, while the honorable discharge doubtless carries some prestige which the general discharge lacks, no stigma attaches to such a discharge, *Ives* v. *Franke*, *supra*, at least none substantially different from a discharge for cause from civilian government or private employment.

in these cases as well as in his own. But it certainly cannot be a *constitutional* requirement that an officer against whom a removal proceeding is instituted on such grounds must have the right to interrogate and cross-examine the superior officer, charged with supervision and evaluation of his work, as to all the bases and reasons for the superior's judgment of unfitness. While such a requirement can be properly imposed in a court-martial proceeding where penalties are imposed, Congress can properly consider it inappropriate and unwarranted in a proceeding merely separating an officer from the military establishment.

(*b*) In any event, it would seem that this particular appellant can have no valid basis for complaining of the procedures which have been employed in his case. The Board of Inquiry found (J.S. App. A7):

> As to the allegation of conduct unbecoming an officer, that cause for retention has not been shown. This finding is based on the following reason:
>
> > The actions of the respondent in permitting himself to be lured by a complete stranger into a latrine, and in that latrine acting in such a manner as to cause his arrest, are completely incompatible with the conduct expected of an officer.

In relation to this crucial determination, the failure of the police officer to appear personally before the Board did not prejudice appellant. As the court below noted (J.S. App. A6):

> * * * Actually, since there were no substantial discrepancies between the two narratives

> [of the September 21 incident], and as the crucial question was what were the plaintiff's intention and mental operations in engaging in the encounter with the police officer, the presence of the latter could hardly have thrown very much light on this vital issue. * * *

Appellant has admitted that he followed the officer to the men's room, and that his conduct was very foolish (J.S. App. A6). Regardless of where the "burden of proof" lay, the Army could reasonably conclude that in the circumstances this admittedly "ill-advised yielding to curiosity" (as the Jurisdictional Statement puts it, J.S. 14) was "completely incompatible with the conduct expected of an officer."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

Title 10 of the United States Code, Supp. II, Chapter 360 (as amended), provides in pertinent part as follows:

CHAPTER 360.—SEPARATION FROM REGULAR ARMY FOR MORAL OR PROFESSIONAL DERELICTION OR IN INTERESTS OF NATIONAL SECURITY

§ 3791. *Selection boards: composition; duties.*

The Secretary of the Army may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Army to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.

§ 3792. *Boards of inquiry: composition; duties.*

(a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 3791 of this title, shall be retained on the active list of the Regular Army.

(b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.

(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.

(d) If a board of inquiry determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

§ 3793. *Boards of review: composition; duties.*

(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Army, at such times as he may prescribe, to review the records of cases of officers recommended by boards of inquiry for removal from the active list of the Regular Army under section 3792 of this title.

(b) If, after reviewing the record of the case, a board of review determines that the officer has failed to establish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

§ 3794. *Removal of officer: action by Secretary of the Army upon recommendation.*

The Secretary of the Army may remove an officer from the active list of the Regular Army if his removal is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive.

§ 3795. *Rights and procedures.*

Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be—

(1) notified in writing of the charges against him, at least 30 days before the hearing of his case by a board of inquiry,

for which he is being required to show cause for retention on the active list;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Army, to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security.

In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

§ 3796. *Officers considered for removal: retirement or discharge.*

(a) At any time during proceedings under this chapter and before the removal of an officer from the active list of the Regular Army, the Secretary of the Army may grant his request—

(1) for voluntary retirement, if he is otherwise qualified therefor; or

(2) for discharge under subsection (b).

(b) Each officer removed from the active list of the Regular Army under this chapter shall—

(1) if on the date of removal he is eligible for voluntary retirement under any law, be retired in the grade and with the pay for which he would be eligible if retired at his request; or

(2) if on that date he is ineligible for voluntary retirement under any law, be discharged in the grade then held with

severance pay computed by multiplying his years of active commissioned service, but not more than 12, by one month's basic pay of that grade.

(c) For the purpose of subsection (b)(2), a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

§ 3797. *Officers eligible to serve on boards.*

(a) No officer may serve on a board under this chapter unless he is senior in regular grade to, and outranks, any officer considered by that board.

(b) No person may be a member of more than one board convened under this chapter for the same officer.

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